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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 3[illegible]75

JOHN D. FLANAGAN, PETITIONER,

vs.

FEDERAL COAL COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

JAMES J. LYNCH,
C. H. GARNER,
Counsel for Petitioner.

(29,653)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 346.

JOHN D. FLANAGAN, PETITIONER,

versus

FEDERAL COAL COMPANY, RESPONDENT.

PETITION FOR CERTIORARI.

To the Honorable the Supreme Court of the United States:

Petitioner, John D. Flanagan, in support of this, his petition for a writ of certiorari to be directed to the Supreme Court of the State of Tennessee to review a decree of judgment rendered March 17, 1923, which affirmed the judgment of the Chancery Court of Hamilton County, Tennessee, rendered on June 5, 1922, respectfully shows:

First. This action was begun in the Chancery Court of Hamilton County, Tennessee, by John D. Flanagan, a resident of the State of Tennessee, against Federal Coal Com-

pany, a corporation chartered and organized under the laws of the State of Delaware, having its principal office in Chattanooga, Hamilton County, Tennessee. The cause of action stated in petitioner's said bill of complaint was that he was the owner and operator of certain coal mines in Grundy County, Tennessee, and was also engaged in the coal brokerage business—that is, in buying and selling coal; that on August 19, 1920, petitioner Flanagan and defendant Federal Coal Company entered into a contract by the terms of which petitioner Flanagan was to sell and deliver to the defendant 200 cars of Tracy City run of mines coal at $9.00 per ton f. o. b. cars at the mines, which coal, by the terms of the contract, was to be delivered between September 1, 1920, and December 31, 1920, fifty cars per month. The bill then charged that petitioner Flanagan was ready, able and willing at all times during the said time mentioned in said contract to deliver the said coal and comply with the said contract; that he began to call on defendant for shipping instructions on September 1, 1920, and shipped every car defendant would accept; that defendant accepted only 73 cars and failed, refused, and declined to accept 127 cars. The bill then charged that coal began to decline in price soon after said contract was entered into and continued to decline, and that this was the reason defendant refused to accept the coal. The bill then charged that if defendant had accepted the coal at the time and price provided in the contract petitioner would have made a clear profit on the 127 cars which defendant failed and refused to accept of $28,241.33, this amount being the difference between the market price and the contract price each month defendant should have accepted said coal under the terms of the contract.

The bill then charged that if petitioner was entitled to recover damages fixed upon the basis of the difference between the market price and contract price at the time of the final breach of the contract, on December 31, 1920, rather than such difference by the month during the term of said contract, his damages would amount to $40,000.00, the market price at the date of the final breach of said contract December 31, 1920, being $2.00 per ton.

The prayer of the bill was for a recovery of $40,000.00 or a recovery of $28,241.33, if the court should be of the opinion that damages should be computed monthly during the term of the contract.

SECTION 2. The answer of defendant admitted the execution of the contract and set up as a defense against liability the fact that by the provision of chapter 134 of the Acts of the Legislature of Tennessee of 1919, petitioner Flanagan was required to pay a privilege tax as a wholesale dealer and broker in coal, both to the State of Tennessee and to the county of Grundy, as a condition precedent to engaging in said business; that by the provisions of said act it was a misdemeanor for petitioner to exercise said privilege without first paying said privilege tax; that he had not paid said tax and therefore "the contract herein was entered into in violation of said provisions of law and is illegal and void."

SECTION 3. The record, a certified copy of which is presented herewith, shows that Federal Coal Company, the purchaser of the coal and respondent in the case, was also engaged in mining coal and in doing a wholesale brokerage business in coal; that it was a Delaware corporation with its mines in the State of Kentucky and its home office in Chatta-

nooga, Tennessee; that it had not complied with the said act of the Legislature of Tennessee with respect to paying the privilege tax hereinbefore mentioned, the reason for its non-compliance with this act being shown by it, and being undisputed, to be that its business was exclusively interstate. It neither produced nor sold any coal in the State of Tennessee. All the coal it sold, or could lawfully sell, including the coal bought from petitioner Flanagan, was sold and shipped to purchasers outside the State of Tennessee. Federal Coal Company sold to purchasers outside the State of Tennessee this coal it contracted to buy from petitioner Flanagan. These purchasers declined to carry out their contracts, whereupon Federal Coal Company declined to carry out its contract with petitioner Flanagan and breached it.

Under the terms of the said contract and the practice followed by the parties, the coal delivered and to be delivered by petitioner Flanagan was loaded and to be loaded in cars at Tracy City, Tennessee, and billed out from that point direct to the customers of Federal Coal Company outside the State of Tennessee.

The Chancellor held that defendant, Federal Coal Company, breached its contract, but that petitioner Flanagan could not recover for this breach, solely because he had not paid the said privilege tax. It was insisted in that court that Flanagan was not liable for this tax because this transaction was interstate commerce. Upon this question, however, that court held that the statute in question imposed a tax upon the privilege of dealing in coal, and that inasmuch as Flanagan had bought the coal and then sold it to the Federal Coal Company under the contract hereinbefore mentioned, he was dealing in coal and subject to this tax, notwithstanding

the fact that the coal was bought for delivery to purchasers outside the State of Tennessee, was to be delivered f. o. b. cars consigned to such purchasers, and as much of it as was delivered was, in fact, delivered to such purchasers outside the State.

Upon appeal by Flanagan, the Supreme Court of Tennessee affirmed the Chancellor. The Supreme Court quotes and adopts in full the opinion of the Chancellor on this point. All the defenses interposed by Federal Coal Company in this said suit were specifically decided by the Chancellor and by the Supreme Court of Tennessee in favor of petitioner Flanagan, except the defense that Flanagan was liable for the said privilege tax and, not having paid it, could not recover.

It is shown by the record, and in nowise disputed, that petitioner Flanagan did business under a trade name or names, and that under one of these trade names he paid the said privilege tax for a period of three months, to wit, from June 18, 1920, to September 18, 1920, but he made no further payment for the period after September 18, 1920.

In connection with this case of Flanagan *vs.* Federal Coal Company, and consolidated and tried with it, there was another case of Federal Coal Company *vs.* W. S. Bates, Tracy City Coal Company and Flanagan. The issues and evidence in that case, however, have no bearing upon the question of Flanagan's liability for the said privilege tax. In that case it was claimed by Federal Coal Company that Flanagan had breached a contract made by Tracy City Coal Company and assumed by him and was liable to Federal Coal Company for this breach. One of Flanagan's defenses in that suit was that the contract of August 19, 1920, between Flanagan and Federal Coal Company, which is sued on in the case of Flana-

gan *vs.* Federal Coal Company, expressly released Tracy City Coal Company from all liability for damages on account of its breach of that contract. The Chancellor and Supreme Court both held that this defense interposed by Flanagan in that suit was a good one; that Flanagan was not liable to Federal Coal Company in any amount or on any account, and the bill in the said case of Federal Coal Company *vs.* Bates, Flanagan and others was dismissed by both said courts.

The issues in this said case of Federal Coal Company *vs.* Bates, Flanagan and others were material with respect to some of the defenses interposed by Federal Coal Company in the case of Flanagan *vs.* Federal Coal Company, but were in nowise relevant or material to the issue upon which alone the Chancellor and Supreme Court specifically decided against Flanagan, to wit, that he was not engaged in interstate commerce and therefore could not recover, because he had not paid the said privilege tax. However, in order that this court may see from the record itself and the opinion of the Chancellor and the Supreme Court that the issues and evidence in the said case of Federal Coal Company *vs.* Bates, Flanagan *et al.* in nowise affect the question upon which alone Flanagan's case against Federal Coal Company was decided against him, a transcript of this consolidated case of Federal Coal Company *vs.* Bates, Flanagan *et al.* is included in the record filed in this court.

Section 4. The question of law for determination by the Chancery Court and by the Supreme Court of Tennessee was, as stated, whether the contract executed between Flanagan and Federal Coal Company and the business done and proposed to be done under that contract was interstate commerce. Under repeated decisions of this court we submit the

contract and the business done and proposed to be done under this contract was interstate commerce and not subject to taxation by the State of Tennessee, and therefore Flanagan could not be denied a recovery solely because he had not paid said privilege tax.

SECTION 5. There is filed with this petition a certified copy of the record from the Supreme Court of Tennessee.

Wherefore your petitioner prays that a writ of certiorari may issue out of and under the seal of this court directed to the Supreme Court of the State of Tennessee, commanding that court to certify the case to this court for review and determination, as provided in the act of Congress known as the Judicial Code, or that your petitioner may have such other and further relief in the premises as to this court may seem appropriate and in conformity with the said act.

And your petitioner will ever pray.

JOHN D. FLANAGAN,
By Attorneys.
JAMES J. LYNCH,
C. H. GARNER,
Attorneys.

STATE OF TENNESSEE,
Hamilton County:

John D. Flanagan, being duly sworn, says that he is the petitioner named in the foregoing petition, that he has read the same and knows the contents thereof, and that the facts therein stated are true to the best of his knowledge, information, and belief.

JOHN D. FLANAGAN.

Sworn to and subscribed before me this May 28, 1923.

[Seal of I. G. Phillips, Notary Public, Hamilton Co., Tenn.]

I. G. PHILLIPS,
Notary Public.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

No. [redacted]75

JOHN D. FLANAGAN, PETITIONER,

versus

FEDERAL COAL COMPANY

BRIEF AND ARGUMENT FOR PETITIONER.

JAMES J. LYNCH,
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No. 346.

JOHN D. FLANAGAN, PETITIONER,

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FEDERAL COAL COMPANY

BRIEF AND ARGUMENT FOR PETITIONER.

STATEMENT OF THE CASE.

On August 19, 1920, petitioner John D. Flanagan entered into a contract with defendant The Federal Coal Company under the terms of which Flanagan sold to the coal company 200 cars of Tracy City run of mines coal at a price of $9.00

per ton f. o. b. cars at the mines, to be shipped 50 cars per month, between September 1, 1920, and December 31, 1920. (Record, pages 27, 28.)

At the time this contract was entered into, Flanagan was a coal dealer doing business at Tracy City, Tennessee, under the trade name of the Cumberland Mountain Coal Company. The Federal Coal Company, the purchaser, was a corporation chartered and organized under the laws of the State of Delaware, with coal mines and offices in the state of Kentucky, and with an office at Chattanooga, Tennessee.

The Federal Coal Company ordered out, and Flanagan shipped, 73 cars of this coal, but failed to order out, and declined to accept, 127 cars of the coal.

Beginning in October, the price of coal declined rapidly, until in December the price was only about $2.00 per ton. Flanagan demanded of the coal company that it accept the balance of the coal and give shipping instructions for the shipment of same, which the coal company declined to do.

On May 6, 1921, petitioner Flanagan brought suit in the Chancery Court of Chattanooga, Tennessee, against the said Federal Coal Company to recover the damages which he alleged he had

suffered on account of the failure of the Federal Coal Company to accept and pay for this coal as per its contract. (Record, pages 25 to 27.)

The defendant answered and denied that it had breached the contract and insisted that the complainant, Flanagan, had failed to pay the privilege tax required of coal dealers by Chapter 134 of the Public Acts of Tennessee of 1919. Other defenses were interposed which are not necessary to be mentioned. Upon the trial of the case the Chancellor held:

1. That complainant Flanagan had complied with all his obligations under the contract.

2. That defendant Federal Coal Company had breached its contract.

3. That Flanagan was not entitled to recover because he had failed to pay the privilege tax required of coal dealers under the Revenue Act of Tennessee, to be hereinafter fully set out, and that Flanagan was not engaged in interstate commerce in such a way as to excuse the payment of said tax. (Record, pages 22 to 25.)

From this decree petitioner Flanagan appealed to the Supreme Court of Tennessee and there insisted, by proper assignments of error, that he was not liable for the privilege tax, be-

cause the contract sued on was interstate commerce, in that the coal was sold by the said Flanagan to the Federal Coal Company to be delivered to purchasers from the said Federal Coal Company in other states, and hence the transaction was within the protection of the commerce clause of the Constitution of the United States.

The Supreme Court of Tennessee held that this was not interstate commerce, and affirmed the Chancellor's decree. (Record, page 244 et seq.)

On May 29, 1923, the said Flanagan filed a petition for certiorari in this court, which was granted by this court on November 19, 1923.

ASSIGNMENTS OF ERROR.

The Supreme Court of Tennessee erred in holding that petitioner Flanagan was barred from a recovery because he had failed to pay the privilege tax required of coal dealers in Tennessee. The coal was sold by the petitioner to the defendant, a foreign corporation, to be delivered to purchasers in states other than Tennessee, to whom the coal had been sold by the said Federal Coal Company. This was interstate commerce, and the dismissal of the petitioner's suit was a denial of his rights under the commerce clause of the Constitution of the United States. (Art. 1, Sec. 8, Clause 3.)

BRIEF AND ARGUMENT.

The undisputed proof shows that the petitioner, Flanagan, complied with the contract on his part, and that it was breached without excuse by the defendant, the Federal Coal Company. The two hundred cars of coal were to have been shipped fifty (50) cars per month, during the months of September, October, November and December. Flanagan delivered the coal as rapidly as he could get the defendant to receive it, until in December, 1920, the defendant definitely refused to take any more coal and finally breached the contract. (R., pp. 45, 46, 47, 119, 188, 189.) Flanagan shipped, and the Federal Coal Company received, seventy-three (73) cars. (R., p. 46.) E. R. Thompson, manager of the Federal Coal Company, admits that the defendant declined to take the coal, its excuse being that the price went down, and the purchasers to whom it had sold the coal failed to take same. (R., pp. 34, 35, 226.) The price of coal rapidly declined, until at the time of the final breach it was worth on the market only Two ($2.00) Dollars per ton, and the petitioner, Flanagan, suffered the full amount of the damages sued for.

As stated, both the Chancery Court at Chattanooga and the Supreme Court of Tennessee found these facts to be true, and petitioner was

denied relief solely because he had failed to pay the privilege tax alleged to have been required by the law of Tennessee, covering the period when the balance of the coal should have been delivered. The statute in question is contained in the general Revenue Bill, passed by the General Assembly of Tennessee in 1919, Chapter 134, Section 4, and provides as follows:

> "*Be it further enacted*, That each vocation, occupation and business hereinafter named in this section is hereby declared to be a privilege and the rate of taxation on such privilege shall be as hereinafter fixed, which privilege tax shall be paid to the County Court Clerk as provided by law for the collection of revenue."

The coal dealers embraced by this Act are described as follows:

> "Persons, firms or corporations engaged in buying, selling, or dealing in coal or coke in carload lots."

Section 16 of this act provides as follows:

> "*Be it further enacted*, That it is hereby a misdemeanor for exercising any of the foregoing privileges without first paying the taxes prescribed for the exercise of the same, and all parties so offending shall be

liable to a fine of not less than $10.00 nor more than $50.00 for each day such privilege is exercised without license, but this inhibition shall not apply to any person, firm or corporation engaged in interstate commerce."

On June 18, 1920, petitioner Flanagan paid the tax required by this act in the trade name of "Cumberland Mountain Coal Company." This payment covered the period from June 18, 1920, to September 18, 1920. (R., p. 232.) This privilege tax was, therefore, paid at the time the contract between Flanagan and the Federal Coal Company was entered into on August 19, 1920. It was paid when a part of the coal was delivered, but the privilege had expired at the time the contract was breached.

THE TRANSACTION WAS INTERSTATE COMMERCE.

This contract was between citizens of different States for the sale of coal to be delivered in other States. Flanagan was a citizen of Grundy County, Tennessee; he owned a small mine of his own, which he operated under the name of "The Cumberland Coal Company." (R., p. 70.) He owned all the stock in the Campbell Branch Coal Company, which he operated. (R., p. 69-70.) He also had a lease on the output of the Tracy

City Coal Company, and also had contracts for a large part of the output of the Staub Coal Company. (R., pp. 237,238-239, and 67-68.) He purchased coal from various other parties. It is obvious that he had enough coal of his own to have completely filled the contract with the Federal Coal Company. Besides the coal delivered to the Federal Coal Company, Flanagan sold coal to various other parties, some of whom were residents of Tennessee. Whether this coal which was sold to residents of Tennessee was sold for delivery outside of the State does not appear, is not material, and has no connection whatever with the contract in question. (R., pp. 251-252.) All the coal delivered to the Federal Coal Company by Flanagan under this contract was delivered, and was intended to be delivered, to purchasers of the Federal Coal Company outside of Tennessee. (R., pp. 233-234-235.)

The Federal Coal Company was a Delaware corporation with large mines situated in the State of Kentucky, and with offices in the State of Kentucky and at Chattanooga, Tennessee. In addition to the coal it mined in Kentucky, the Federal Coal Company frequently bought coal as a broker, but none of this coal was bought for sale in Tennessee.

The Federal Coal Company did not pay this privilege tax required by the statute of Tennes-

see, and could not legally have bought and sold coal in Tennessee for delivery in this State. (R., 82.) The coal sold by Flanagan to the Federal Coal Company was for delivery in other States to customers to whom that Company had already contracted to deliver the coal. This is shown by the testimony of the manager, E. R. Thompson. (R., pp. 78-79-80-164.)

Aside from the fact that the Federal Coal Company had no license and could not lawfully sell coal in Tennessee that was purchased in this State, Thompson explains that the Company had business reasons for not selling this coal in Tennessee. (R., p. 164.) Both of the parties understood this at the time the contract was made. Prior to the time this contract was made the Federal Coal Company had purchased coal from the Tracy City Coal Company, of which Flanagan was an officer, and all this coal had been shipped to South Carolina for export, and to purchasers in the State of Georgia. (R., 141.)

The method of handling this coal is explained in the stipulation of counsel as follows:

> "It is further agreed that all the coal shipped on the order of Federal Coal Company, under said contract sued on was shipped in the name of Federal Coal Company—i. e., the bills of lading were taken from the railroad company at Tracy City,

> Tennessee, by said Flanagan, or the mines, in the name of the Federal Coal Company as shippers, the coal being consigned according to orders theretofore given by said Federal Coal Company." (R., p. 252.)

So that the very act of delivering this coal was to place it in interstate commerce. The manner in which shipping orders were issued is shown by one of the orders filed in the record at page 236.

As we have explained, the Federal Coal Company consumed no coal and kept none in stock. Its purchases were all for resale, and the deliveries were not made to it, but to the purchasers from it. This is explained by the testimony of Mr. Thompson, the manager of the Federal Coal Company, as follows:

> "Q. 17. What is their practice with respect to buying and selling; that is, do they buy in stock, or do they buy and sell usually so that the car will move from their purchaser to their customer?
>
> A. In most cases it moves direct from the person from whom they buy it to the person to whom they sell it; *they never stock it, because that would involve handling charges. It is always continuous moving from the mine to destination; if it is halted*

anywhere it is halted in the car and held by the Railroad Company." (R., 175-176.)

The Federal Coal Company had already contracted to sell this coal to purchasers in other States before it made its contract with Flanagan. Mr. Thompson, the manager of the Company, testified:

"A. We made a trade with Mr. Flanagan to take a certain amount of coal from him. *We had it sold to other parties.* For some reason they could not, or would not, take the coal; when they didn't we would not take it.

Q. 24. Why didn't you take it?

A. Because our customers would not take it from us." (R., p. 226.)

The Federal Coal Company is now suing these purchasers for failing to take this coal. (R., pp. 78-79-80.)

The general manager of the Federal Coal Company in his testimony makes it clear that that Company only buys coal to supply the existing demands of its customers when the supply from its mines is inadequate. These customers were all outside of Tennessee, and, as shown, the purchase from Flanagan was made for the purpose of filling existing contracts with these non-resident purchasers.

As we have shown, the *contract* in this case violated no law for two reasons:

(a) At the time the contract was made the parties understood that the coal was for interstate shipment.

(b) At the time the contract was made Flanagan had paid the privilege tax in question.

In *delivering* the coal to the Federal Coal Company, Flanagan violated no law of the State of Tennessee, because the coal was all shipped to purchasers in other States.

Flanagan did not violate the law of Tennessee in failing to again pay this privilege tax on September 18, because at that time the shipments that he had made to the Federal Coal Company were all to purchasers in other States, and the course of dealing had fully demonstrated the fact that this was purely an interstate commerce transaction.

At the time of the *final breach* of the contract in December, 1920, petitioner Flanagan had violated no law of the State of Tennessee in failing to pay the tax, because all the coal that he had delivered under this contract had been shipped in interstate commerce to purchasers in other States. (R., pp. 233-234-235.)

It is therefore clear that the law of Tennessee was not violated by the petitioner, Flanagan—either *in making the contract* with Federal Coal Company or in *executing* the contract up to the time it was breached.

The opinion of the Chancellor, which was adopted by the Supreme Court of Tennessee, states the position of those courts as follows:

> "But the statute did not impose any tax upon *the mere sale* of the coal. Had this been Flanagan's coal he would not have been liable to the tax, no matter where or to whom he sold it. The thing that is taxed is the privilege of dealing in coal. What made him liable to the tax was the fact that he was engaged *in buying coal to sell again.* Not having paid the tax and obtained a license to do that business, he cannot recover upon any contract for the sale of coal so bought." (R., p. 246.) (Italics ours.)

It must be borne in mind that at the time Flanagan's license expired, on September 18, he had already contracted for sufficient coal to have more than filled this contract, and further that a large part of the contract could have been filled from his own mines. But, even assuming that he had to purchase on the market as a broker the coal with which to fill this contract, the po-

sition of the Supreme Court of Tennessee is not tenable. As stated by that court, the mere sale of an article would not impose liability for this tax. In other words, the *mere purchase* by Flanagan of coal without a sale of it would not subject him to liability for the tax. It was both the buying and selling which made him a dealer and liable for the tax. (17 C. J., 1154.) Therefore, as the sale was an essential part of the dealing which imposed liability for the tax, and that sale was for interstate shipment, necessarily the transaction was one of interstate commerce.

The question at last is this:

Could the State of Tennessee have legally prevented Flanagan from completing this contract and delivering this coal by shipping same to the customers of the Federal Coal Company in other states?

Would not a tax upon the act of delivering this coal be a direct burden upon interstate commerce?

Assuming that Flanagan purchased this coal as he delivered it, and purchased it for the purpose of delivering it, it was none the less interstate commerce. His purchases were made in carload lots, and when the coal was delivered, bills of lading were taken out in the name of the

Federal Coal Company, the coal being consigned to that Company's customers in other States. The delivery to Flanagan was, in itself, a delivery to the Federal Coal Company's consignee. The very fact of delivering placed the coal in interstate commerce. (R., p. 252.)

That such a purchase in one State for delivery in another State is interstate commerce has been conclusively settled by the repeated decisions of this court.

In *Lemke vs. Farmers Grain Company*, 259 U. S., p. 50, the direct question was considered and settled. In that case certain elevator companies in the State of North Dakota were engaged in purchasing wheat from farmers in that State, and storing same in elevators for the purpose of resale and shipment to other States. The court held that this was interstate commerce, and could not be burdened by inspection laws and other State regulations. Among other things, the Court say:

> "That such course of dealing constitutes interstate commerce, there can be no question. This court has so held in many cases, and we have had occasion to discuss and decide the nature of such commerce in a case closely analogous in its facts, and altogether so in principle. Dahnke-Walker Mill Co. vs. Bondurant, decided December 12, 1921,

(257 U. S. 282, ante 239, 42 Sup. Ct. Rep. 106). In that case the facts disclose that a company organized in Tennessee, and carrying on business there, went into Kentucky, and, through an agent there, bought wheat for shipment to the company's mill in Tennessee. The State Court held that the transaction was merely a purchase of wheat in Kentucky, and made the Tennessee company amenable to the regulatory statutes of the State. This court rejected the conclusion of the State Court, *and held that the buying, no less than the selling, of grain, under such circumstances, was a part of interstate commerce*, committed to national control by the Federal Constitution. Applying the principle of that decision, and the previous decisions of this court, cited in the opinion, the complainant's course of dealing in the buying of grain, which it purchased and sold under the circumstances as herein disclosed, was interstate commerce. Being such, the State could not regulate the business by a statute which had the effect to control and burden interstate commerce.

"Nor is this conclusion opposed by cases decided in this court and relied upon by appellates, in which we have had occasion to define the line between State and Federal authority under facts presented, which required a definition of interstate commerce,

where the right of state taxation was involved, or manufacture or commerce of an intrastate character was the subject of consideration. In those cases we have decided the beginning of intrastate commerce as that time when goods begin their intrastate journey by delivery to a carrier or otherwise, thus passing beyond State authority into the domain of Federal control. Cases of that type are not in conflict with principles recognized as controlling here. None of them indicates, much less decides, that interstate commerce does not include *the buying and selling of products for shipment beyond State lines.* It is true, as appellants contend, that after the wheat was delivered at complainant's elevator, or loaded on the cars for shipment, it might have been diverted to a local market or sent to a local mill. But such was not the course of business. The testimony shows that practically all the wheat purchased by the complainant was for shipment to and sale in the Minneapolis market. That was the course of business, and fixed and determined the interstate character of the transaction." (Italics are ours.)

It must be remembered that the very thing the State of North Dakota was attempting to burden was the purchase by the elevator compa-

nies from farmers in the State of North Dakota. In that case the elevators stored the wheat after the domestic purchases, and the contracts for sales were made thereafter. Yet, because the uniform course of dealing had established the fact that the wheat so purchased and stored was all shipped out of the State the court held the purchases for storage were a part of interstate commerce transactions.

In Dahnke Milling Company vs. Bondurant, supra, the court say:

> "Where goods in one State are transported into another for purposes of sale, the commerce does not end with the transportation, but embraces as well the sale of goods after they reach their destination, and while they are in the original packages. (Brown vs. Maryland, 12 Wheat. 419, 446, 447, 6 L. Ed. 678, 688, 689; American Steel & Wire Co. vs. Speed, 192 U. S. 500, 519, 48 L. Ed. 538, 546, 24 Sup. St. Rep. 365.) On the same principle, where goods are purchased in one state for transportation to another, the commerce includes the purchase quite as much as it does the transportation. (American Express Co. vs. Iowa, 196 U. S. 133, 143, 49 L. Ed. 417, 422, 25 Sup. Ct. Rep. 182.) This has been recognized in many decisions, construing the commerce

clause. Thus it was said in Welton vs. Missouri, 91 U. S. 275, 280, 23 L. Ed. 347, 349: 'Commerce' is a term of the largest import. It comprehends intercourse for the purpose of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities. In Kidd vs. Pearson, 128 U. S. 1, 20, 32 L. Ed. 346, 350, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6, it was tersely said: Buying and selling and the transportation incidental thereto constitute commerce. In United States vs. E. C. Knight Co., 156 U. S. 1, 13, 39 L. Ed. 325, 329, 15 Sup. Ct. Rep. 249, contracts to buy, sell, or exchange goods to be transported among the several States were declared part of interstate trade or commerce. And in Addyston Pipe & Steel Co. vs. United States, 175 U. S. 211, 241, 44 L. Ed. 136, 147, 20 Sup. Ct. Rep. 96, the court referred to the prior decisions as establishing that 'interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different States, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale and exchange of commodities.' In no case has the court made any distinction between buying and selling, or between buying for transportation to another State and transporting for

sale in another State. Quite to the contrary, the import of the decisions has been that if the transportation was incidental to buying or selling, it was not material whether it came first or last."

This question was again conclusively settled by this court in the case of A. G. Spalding vs. Wm. H. Edwards, published in the Advanced Opinions of May 15, 1923, at page 539. In that case Scholtz & Co., brokers in New York, purchased goods of Spalding & Co., in New York, for the purpose of shipping same to a firm in Venezuela. The court held that the purchase by Scholtz & Co. from Spalding for the purpose of filling this order was foreign commerce and could not be taxed. Among other things, the court say:

"*The very act that passed the title, and that would have incurred the tax had the transaction been domestic, committed the goods to the carrier that was to take them across the sea,* for the purpose of export, and with the direction to the foreign port upon the goods. The expected and accomplished effect of the act was to start them for that port. The fact that further acts were to be done before the goods would get to sea does not matter so long as they were only the regular steps to the contemplated result. Getting the bill of lading stands no

differently from putting the goods on board ship. Neither does it matter that the title was in Scholtz & Co., and that, *theoretically, they might change their mind and retain the bats and balls for their own use.*" (Italics ours.)

The court in that case cited as applicable the cases of Railroad Commission vs. Texas & P. R. Company, 229 U. S., page 336; Texas & N. O. R. Company vs. Sabine Tram Company, 227 U. S., page 111, in which cases it is held that freight purchased in a State and shipped on local bills of lading to another point in that State, which was intended for reshipment to foreign ports, was interstate commerce and subject to the rate fixed by the Interstate Commerce Commission on through shipment although it was billed to the purchaser at a point within the State and might have been diverted, or kept within the State, if the purchaser had desired. This court has held in several cases that cattle or wheat purchased within a state for reshipment out of the state by members of Boards of Trade and in stockyard dealings are subject to Federal regulation as interstate commerce. Board of Trade vs. Olsen, 262 U. S., 1; Stafford vs. Wallace, 258 U. S., 495; Swift & Company vs. United States, 196 U. S., 375.

This court has held in several cases that the

purchase, accumulation and piping of oil in pipe lines within a state is interstate commerce, and free from state taxation, when this oil is intended for transmission into other states.. Eureka Pipe Line vs. Walter S. Hallanan, 257 U. S., 265; U. S. Fuel Gas Company vs. Hallanan, 257 U. S., 277; Pennsylvania vs. West Virginia, 262 U. S., 553.

In the case of Heyman vs. Hays, 236 U. S., 176 this court reversed the decision of the supreme court of Tennessee with reference to the liability of liquor dealers at Chattanooga for the Tennessee privilege tax. These dealers were engaged in procuring and storing liquor and shipping same to purchasers in other states. The privilege tax was assessed against these liquor men as "dealers." This court held their business was interstate commerce, and was not subject to state taxation.

We submit that the principles announced in that case, and in the other cases herein cited, are conclusive of the questions involved in the case at bar.

PETITIONER IS JUSTLY ENTITLED TO A RECOVERY

The undisputed proof shows that after the contract was entered into petitioner Flanagan delivered all the coal that the defendant would

permit him to deliver, and that he, Flanagan, tendered the coal and did everything possible to induce the defendant to accept the balance, but after the price of the coal declined the defendant refused to accept the coal and breached its contract.

The proof shows that the difference between the contract price and the market price at the dates on which the defendant should have accepted the coal was approximately $28,000; the difference between the contract price and the market price at the date of the final breach was approximately $40,000. We assume, however, that the amount of petitioner's recovery will have to be ascertained by a proper reference after the case is remanded to the Tennessee courts.

THE BATES CASE

Inasmuch as adversary counsel have insisted that the record in the case of the Federal Coal Company vs. W. S. Bates and Tracy City Coal Company be incorporated in the transcript in this court, we assume they will rely upon that record, and for that reason we deem it proper to make a statement with reference to that litigation, which we shall hereafter refer to as the *Bates* case as distinguished from the case at bar, which we refer to as the *Flanagan* case.

It appears that some time prior to April 7th,

1920, the Tracy City Coal Company entered into a contract to sell to the Chattanooga Coal Company (owned by W. S. Bates) eighteen thousand tons of coal, to be delivered eight cars per week from April 12th, 1920, to April 12th, 1921 (R. p. 5.). Later, this contract was assigned by the said Bates to the Federal Coal Company. (R. p. 2.)

Petitioner Flanagan was a stockholder in the Tracy City Coal Company, and had leased its mines covering the period in controversy. At the time the contract sued on in this case (Flanagan vs. Federal Coal Company) was entered into between Petitioner Flanagan and the Federal Coal Company, it appears that the Bates contract had not been complied with and very little coal had been delivered under it. It further appears that when this contract was entered into between Flanagan and the Federal Coal Company on August 19th, 1920, upon which this suit is predicated, the parties thereto agreed to cancel the Bates contract and the Federal Coal Company agreed to release the Tracy City Coal Company from liability thereunder. The Flanagan contract contains this clause:

> "In consideration of this sale by party of first part and faithful performance of this contract, party of the second part agrees to release the Tracy City Coal Com-

> pany from all liability under contract made about April 1st, 1920, between the Tracy City Coal Company and the Chattanooga Coal Company, which contract was assigned by the Chattanooga Coal Company to Federal Coal Company on the 7th day of April, 1920." (*Record, page* 28.)

Notwithstanding this agreement, the Federal Coal Company, after Petitioner Flanagan began his suit, filed a bill in the Chancery Court at Chattanooga against the said Bates and the Tracy City Coal Company on August 24th, 1921, seeking to recover for the breach of the Bates contract. (R. p. 1-6.)

Later, that bill was amended and Flanagan was made a defendant. In the amended bill it was charged that the cancellation of the Bates contract was without consideration and was procured by fraud. It was further alleged that Flanagan, as the lessee of the Tracy City Coal Company, was liable for the breach of that contract. (R. p. 9-12.)

Later, the Federal Coal Company elected to dismiss the Bates suit *as against Flanagan*, and sought to hold only the Tracy City Coal Company for the alleged breach complained of. (R. p. 15.)

While Flanagan was not a party to that case,

after this dismissal was entered, the two cases were heard together as a matter of convenience, the same proof being used by agreement in both cases. Both the chancellor and the supreme court held there was no proof whatever of any fraud in the cancellation of the Bates contract, and that the agreement to cancel was made for a valuable consideration (R. p. 224-250), and the Bates case was of course dismissed.

It will be noticed that in the opinions delivered, both the chancellor and the supreme court dealt with the two cases separately. Near the conclusion of the opinion of the Supreme Court in the Bates case, however, the following statement appears:

> "In our opinion, the decree of the Chancellor meets the equity of these causes, and taking the record as a whole, we are of the opinion that from a standpoint of justice neither party is entitled to recover from the other. Each flagrantly violated its contract, and the loss in one cause should, in fairness, be offset against the loss in the other." (*R. p.* 250.)

This statement is purely dictum, and should not in any manner prejudice Petitioner Flanagan's rights in his case. It must be borne in mind that the contract sued on in the Bates case was cancelled for a valuable consideration, and

all rights under same waived, in a contract entered into in good faith and without fraud, as found by both the chancellor and the supreme court.

In other words, the Bates contract was *cancelled* at the same time the Flanagan contract was *executed.*

The Federal Coal Company waived its claim for damages under the Bates contract in order to procure the execution of the Flanagan contract. The Bates case was voluntarily dismissed against Flanagan; no recovery was sought against him. He was not a party to that litigation and his rights cannot be prejudiced by the dictum above quoted.

The bill in the Bates case was not dismissed because of any supposed equities between the parties, but that bill was dismissed because the court found as a fact that the Bates contract was voluntarily cancelled without fraud and for a valuable consideration. Therefore, there could not, of course, be a right of recovery for a breach of that *cancelled* contract.

THE FEDERAL COAL CO. ASSERTING RIGHTS UNDER THE FLANAGAN CONTRACT.

The Federal Coal Company not only breached

the Flanagan contract without a legal excuse after having received the benefit of it as long as the prices of coal made it a favorable contract, but it continues to assert all its rights by virtue of having contracted for this coal.

The Federal Coal Company purchased this coal from Flanagan in order to fill contracts it had with purchasers in other states. When the price of coal went down, these purchasers in other states breached their contracts with the Federal Coal Company and failed to take the coal. Notwithstanding its breach of the Flanagan contract, the Federal Coal Company is now suing these purchasers to whom it had contracted this coal, on account of their failure to take from it the coal it had contracted to take from Flanagan.

Respectfully submitted,

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of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1923

No. [redacted]75

JOHN D. FLANAGAN, Petitioner

vs.

FEDERAL COAL COMPANY.

REPLY BRIEF AND ARGUMENT FOR DEFENDANT.

CHAS. C. MOORE,
Counsel for Defendant.

BROADWAY-HERDER, JACKSON, TENN.

INDEX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923

No. 346.

JOHN D. FLANAGAN, Petitioner

vs.

FEDERAL COAL COMPANY.

REPLY BRIEF FOR THE FEDERAL COAL COMPANY.

STATEMENT OF THE CASE.

This case should not be in this court for two reasons:

(a) No notice of the date of the submission of the petition for certiorari was given as required by Sections 3 and 4 of Rule 37 of this court.

(b) The judgment of the State Supreme Court of Tennessee was rested upon other grounds broad enough to maintain the judgment independent of the Federal question sought to be made here.

(a) Petition for certiorari was filed in this Court on May 29, 1923. It was not submitted within the time required by Section 4 of Rule 37, because petitioner failed to have his record printed in time for submission. Counsel for this defendant consented to an extension of time for printing the record and submitting the case, expecting to receive copy of the printed record and brief with notice of the date of submission. Neither were received. The order granting the certiorari recites that it was granted upon the consideration of the petition and "Upon the argument of counsel thereupon had" (R. 254) Counsel for this defendant had no notice of any hearing and no opportunity to present arguments.

(b) If the defendant had been given notice of the submission of petition with opportunity to be heard in opposition thereto, it would have shown that this Court is without jurisdiction because the Federal question sought to be made was not the determinative question in the State Court's decision.

These consolidated causes were in effect an action and a cross-action between John D. Flanagan and the Federal Coal Company as principal parties at interest. The dealings between these parties had their origin in a contract dated April 7, 1920, entered into nominally between the Tracy City Coal Company and W. S. Bates. Both the State Chancery Court (R. 19) and the State Supreme Court (R. 247) found that in the making of that contract John D. Flanagan was the undisclosed principal for whom the name of the Tracy City Coal Company was used, and W. S. Bates was buying the coal for the Federal Coal Company. Bates at once assigned the contract

to the Federal Coal Company (R. 2). By this contract petitioner Flanagan as undisclosed principal engaged to deliver 18,000 tons of coal at the price of $3.90 per ton, f. o. b. cars Tracy City, Tennessee. By July 1920, this coal had advanced to $10.00 per ton, and no coal was being shipped under the contract (R. 247). From the time of the last shipment under this contract on May 25th (R. 208) until August 19th when Flanagan entered into a second contract sued on herein to sell the same coal to the Federal Coal Company direct at the price of $9.00 per ton, he did not tell the Federal Coal Company, or any of its representatives, that the duty and obligation to ship and deliver the 18,000 tons of coal under the first contract of April 7th rested on him. On the contrary, always in conversation with the Federal Coal Company representatives, he referred to that contract as the obligation of the Tracy City Coal Company which did not rest upon him at all (R. 212). The fact that he made a second contract to sell at $9.00 per ton the same coal that he was already bound to deliver under the first contract at $3.90 per ton, and concealed the fact that he was so bound was relied upon by the Federal Coal Company as a fraud vitiating the second contract. Moreover, the Federal Coal Company insisted that there was no consideration for the second contract, because it only bound Flanagan to deliver the same coal that he was already bound to deliver under the first contract.

This statement of the undisputed facts shows that the Chancellor and the State Supreme Court reached the end of substantial justice. In affirming the decree of the Chancellor, denying the recovery to either of the parties, the State Supreme Court said:

> "In our opinion the decree of the Chancellor meets the equity of these causes, and taking the record as a whole, we are of the opinion that from a standpoint of justice, neither party is entitled to recover from the other. Each flagrantly violated its contract, and the loss in one case should in fairness be offset against the loss in the other." (R. 250.)

A thoughtful reading of the entire opinion of the Tennessee Supreme Court deciding these consolidated causes (R. 244-250) compels the conclusion that the above quoted concluding paragraph of the opinion is the essence of the decision. In the opinion of that Court neither of the parties was entitled to recover against the other and the questions made were so decided as to reach that result.

Petitioner Flanagan admits in his testimony (R. 212) that he concealed from the Federal Coal Company the fact that he was bound as principal under the first contract. He procured the second contract to sell the same coal at an advanced price by this concealment. The reasoning of the State Court to the conclusion that this was not such fraud as vitiated the second contract is not to my mind altogether satisfactory. Neither is it clearly seen what consideration supports the second contract sued on by Flanagan.

But the Court reached the conclusion upon the whole case that "Neither party is entitled to recover from the other."

Having reached this conclusion, the incidental rulings upon the question of fraud, and want of consideration on

the one hand, and, upon the question of failure of Flanagan to pay his privilege taxes upon the other, were but steps in reaching the result which in the opinion of the Court, the justice of the case required.

> "It is settled law that where the record discloses that the judgment of the State Court was based not alone upon a ground involving a Federal question, but also upon another and independent ground broad enough to maintain the judgment, this Court will not take jurisdiction to review such judgment, and will dismiss a writ of error brought for that purpose." *New York ex rel vs. Atwell*, 261 U. S. 590, 67 Law Ed. 814; *Egan vs. Hart*, 155 U. S. 189, 41 Law Ed. 680.

Adversary brief (pp. 25-27) seeks to escape the application of the above quoted rule by the statement that the suit of the Federal Coal Company against the Tracy City Coal Company and petitioner, Flanagan, for breach of the first contract, was dismissed in the lower court as to Flanagan, that he was not a party to that cause in the Appellate Court and that the quoted ruling of that Court was dictum as to him. Record 15 is cited to support the statement.

The order cited sustained a motion of the petitioner Flanagan and the Tracy City Coal Company as joint defendants in that suit to require an election, because the suit was against Flanagan as undisclosed principal and the Tracy City Coal Company as agent. The order as entered shows an election to claim judgment against the Tracy City Coal Company, but does not dismiss the suit as to petitioner Flanagan. Moreover, this cause had been previously consolidated with the suit of Flanagan against

the Federal Coal Company. It then stood as one cause and was so heard and determined (R. 250). Clearly the State Supreme Court regarded Flanagan as a party when it ruled, "We are of the opinion that from a standpoint of justice, neither is entitled to recover from the other." That is a question of local practice on which the judgment of that Court is conclusive.

THE MERITS.

Petitioner Flanagan in April, 1920 (R. 247) began to buy, sell and deal in coal generally at Tracy City, in Grundy County, Tennessee, and on June 18, 1920, paid a privilege tax to the State of Tennessee and Grundy County, and took out license for three months "To exercise the privilege of dealing in coal and coke in Grundy County," which license expired September 18, 1920 (R. 232). He continued this business of buying and selling coal until the close of December, 1920, without paying additional tax. All of the coal was purchased by him from different mines f. o. b. cars Tracy City, Tennessee, and was sold and delivered each day f. o. b. cars Tracy City as he bought it (R. 251).

Adversary brief (p. 8) makes the statement that petitioner Flanagan had and was producing enough coal of his own to fill the contract in suit. The State Chancery Court found the fact to be (R. 23) that he handled very little if any coal of his own production and not anything like enough to fill this contract. The State Supreme Court found the facts in this connection as follows:

> "The record of his (Flanagan's) transactions which he files here shows that all the coal which

> he sold during this period he purchased from some other person or corporation, and all the coal which he delivered to the Federal Coal Company he bought from the Campbell Branch Coal Co., and probably owned all of its stock. Nevertheless, it was the legal entity which operated the Tracy City mines and sold the coal to him. This was more than a merely legal conception. It had a practical effect. The price at which the corporation sold the coal to him was less than the price at which he sold it to the Federal Coal Company, and the royalty paid to the Tracy City Coal Company was computed on the price which he credited to the Campbell Branch Coal Company. He, himself, calls the difference his commission or brokerage charge. He cannot get away from the fact, and should not be allowed to get away from the fact, that in this transaction he was a dealer in coal." (R. 245.)

The second contract in suit of August 19, 1920, recites that it is "By and between John D. Flanagan of Tracy City, Tennessee, party of the first part, and the Federal Coal Company, a corporation of Chattanooga, Tennessee, party of the second part." It provides that the coal sold was to be "Tracy City run of mine," delivery at the rate of fifty cars per month between September 1st and December 31, 1920. It further provides, "This sale is made f.o. b. cars mines and railroad weights are to govern all settlements." (R. 27-28). By this contract petitioner Flanagan recognized himself as bound to ship the coal upon the orders of the Federal Coal Company to any consignee that they might direct (R. 45), and he charges in his pleading (R. 26) that he could not ship the coal because defendant would not give him shipping instructions.

The Federal Coal Company had contracted to deliver coal to customers outside of Tennessee, and it contracted for the coal from petitioner Flanagan intending at the time to ship it to its customers outside the state. All that was shipped went to these customers. It failed to take part of the coal because its customers breached their contracts and refused to receive it.

Undoubtedly, the Federal Coal Company in buying this coal was engaged in interstate commerce. From this premise adversary brief argues that since the purchaser was engaged in interstate commerce, in making the purchaser, the seller was so engaged in making the sale. This conclusion, I submit, does not necessarily follow.

If the sale and delivery of the coal by Flanagan was for that reason interstate commerce, then its purchase by him must for the same reason be interstate commerce, because he could not sell and deliver it without first buying it. By the same reasoning the mine operator in selling to him, in mining the coal and employing miners for this purpose was engaged in interstate commerce, because each was an essential prerequisite of the other.

Even adversary counsel will not insist that all the persons in this chain of causation were engaged in interstate commerce merely because the purchaser from petitioner Flanagan intended to export the coal.

The Tennessee Supreme Court in construing and applying this local revenue statute in this case has said that the tax is levied not upon the sale but upon the business of dealing, which embraces both buying and selling.

The Court ruled that Flanagan might sell coal produced by him without paying the tax. He become subject to the tax, not because he made this sale to the Federal Coal Company, but because he engaged in the business of buying and selling coal. While paying the tax, petitioner Flanagan had the right to sell and did sell coal to local users. The sale of a part of it to the Federal Coal Company which it shipped out of the state was only an incident of the local business being conducted. The tax is not levied upon the sale for foreign shipment. Even if petitioner Flanagan had engaged exclusively in selling to foreign customers, he would have been charged no higher tax than a competitor engaged exclusively in selling to local customers. There was no discrimination.

The clear distinction between the power of a state to impose a privilege tax upon a business which deals in articles of interstate commerce and the power of the state to tax the commerce itself was made by this Court in the early case of *Nathan vs. Louisiana,* 8th Howard 73, 12th Law Ed. 993. The State of Louisiana had imposed a privilege tax upon the business of money and exchange broker. The plaintiff Nathan handled bills of exchange for residents of Louisiana and sold them to purchasers outside the state of Louisiana. For that reason, he insisted that he was not subject to the tax. In overruling that contention, the Court said:

> "This is not a tax on bills of exchange. Under the law, every person is free to buy or sell bills of exchange, as may be necessary in his business transactions; but he is required to pay the tax if he engage in the business of a money or an exchange broker.

"The right of a state to tax its own citizens for the prosecution of any particular business, or profession, within the state, has not been doubted. And we find that in every state money or exchange brokers, venders of merchandise of our own or foreign manufacture, retailers of ardent spirits, tavern keepers, auctioneers, those who practice the learned professions, and every description of property, not exempted by law are taxed.

"As an exchange broker, the defendant had a right to deal in every description of paper and in every kind of money; but it seems his business was limited to foreign bills of exchange. Money is admitted to be an instrument of commerce, and so is a bill of exchange; and upon this ground it is insisted that a tax upon an exchange broker is a tax upon the instruments of commerce.

"What is there in the products of agriculture, of mechanical ingenuity, of manufacturers, which may not become the means of commerce? And is the vender of these products exempted from state taxation, because they may be thus used? Is a tax upon a ship, as property, which is admitted to be an instrument of commerce, prohibited to a State? May it not tax the business of ship building, the same as the exercise of any other mechanical art? And also the traffic of ship chandlers, and others, who furnish the cargo of the ship and the necessary supplies? There can be but one answer to these questions. No one can claim an exemption from a general tax on his business, within the state, on the ground that the products sold may be used in commerce.

"No State can tax an export or an import as such, except under the limitations of the Constitution. But, before the article becomes an export, or after it ceases to be an import, by being mingled

with other property in the State, it is a subject of taxation by the State. A cotton broker may be required to pay a tax upon his business, or by way of license, although he may buy and sell cotton for foreign exportation. * * *

"Now, the individual who uses his money and credit in buying and selling bills of exchange, and who thereby realizes a profit, may be taxed by a state in proportion to his income, as other persons are taxed, or in the form of a license. He is not engaged in commerce. He is less connected with it than the ship builder, without whose labor foreign commerce could not be carried on."

The ruling in the above quoted case that "No one can claim an exemption from a general tax on his business within the State on the ground that the products sold may be used in commerce," has been followed and approved in numerous decisions of this Court and of the various circuit and State courts.

Kirtland vs. Hotchkiss, 100 U. S. 490, 25 L. Ed. 562;
Van Brockland vs. Tennessee, 117 U. S. 176, 29 L. Ed. 854;
Hall vs. Virginia, 8th Wallace 184, 19 L. Ed. 361;
State Tonnage Tax Cases, 12th Wallace 213, 20 L. Ed. 373;
Ward vs. Maryland, 12th Wallace 428, 20 L. Ed. 452;
Walling vs. Michigan, 116th U. S. 460, 29 L. Ed. 696;
Brown vs. Maryland, 12th Wheaton 444, 6 L. Ed. 687;
Pierce vs. New Hampshire, 46th U. S. 593, 12 L. 296;
Machine Co. vs. Gage, 100th U. S. 676, 25 L. Ed. 754;
Osborne vs. Mobile, 44th Ala. 499;

People vs. Coleman, 4th California, 58;
Wiggins Ferry Co. vs. East St. Louis, 102 Ill. 572;
New Orleans vs. Eclipse Towboat Co., 33 La. 648;
Corson vs. Maryland, 57th Md., 266;
State vs. Applegarth, 81st Md., 305, 28 L. R. A. 816;
State vs. Walton, 55th Mo. 291;
State vs. Harrington, 68th Vermont, 628.
Insurance Co. vs. Commonwealth, 87th Pa. State 183;
Western Union Tel. Co. vs. Richmond, 26th Gratt, 23.

In *Transportation vs. Wheeling*, 99th U. S. 279, 25th L. Ed. 414, the Court rules that it is within the power of a State to levy an ad valorem property tax against the resident owner of a vessel although engaged exclusively in interstate commerce.

In *Howe Machine Co. vs. Gage*, 100th U. S. 679, 25th L. Ed. 754, this Court held valid a statute of Tennessee imposing a privilege tax upon peddlers of sewing machines, which applied alike to machines made within the State and those made out of the State.

In *Woodruff vs. Parham*, 8th Wallace, 123, this Court held valid a privilege tax upon auctioneers imposed by a State upon auction sales alike of goods which were the products of the State as well as those which were products of other States.

In *Walling vs. Michigan*, 116th U. S. 446, 29th L. Ed. 691, this Court again pointed the distinction between a non-discriminatory tax upon businesses or the sale of merchandise, and the tax which discriminated against such businesses, because of the importation of the pro-

ducts dealt in, holding the former valid and the latter invalid.

In *Cornell vs. Coyne*, 192 U. S. 418, 48 L. Ed. 504, this Court held that a privilege tax of $400.00 per annum upon the business of manufacturing filled cheese and one cent per pound upon the cheese so manufactured was not a tax "On any article exported from any State" in the meaning of the fifth paragraph of Section 9, Article 1 of the Constitution. The determinative question in that case was whether the tax upon the business of manufacturing filled cheese measured in part by one cent per pound upon the amount produced was a tax or duty upon an export where the entire output of the factory was manufactured under a contract previously made for its sale and export from the State.

It was ruled that the purpose of the manufacturer to export the article being manufactured, and the fact that it had already been sold for export, did not make the tax imposed on the business a tax on the article.

In *Heisler vs. Thomas Colleries*, 260 U. S. 256, 67 L. Ed. 242, this Court held valid a tax imposed by the State of Pennsylvania upon Anthracite coal when prepared for shipment to market out of the State.

In *Coe vs. Errol*, 116 U. S. 517, 29 L. Ed. 715, the Court held that saw-logs cut in New Hampshire floated to the village of Errol, awaiting loading for shipment out of the State was subject to taxation and were not in interstate commerce.

In *Susquehana Coal Company vs. South Amboy*, 228 U. S. 665, 57 L. Ed., 1015, the Court held that coal mined in Pennsylvania, shipped to and stored in New Jersey to be ready to fill orders that might be received from other States was subject to taxation in New Jersey.

These cases were dealing with the tax levied directly up the property itself, and the question was whether or not the property at the time was in interstate commerce or at rest as a part of the local property of the State. They but illustrate conditions under which property at rest is subject to local taxation, and are authority for the proposition that the coal which petitioner Flanagan was selling to the Federal Coal Company was subject to taxation in his hands up to the moment title passed out of him.

Adversary brief (p. 14) states that the ultimate question is the power of the State to levy a tax upon the act of delivering the coal or to prohibit its delivery. On the contrary, we have seen that the Supreme Court of Tennessee in line with other courts upon the same subject ruled that this is not a tax upon the sale or delivery of the coal, but upon the business of dealing in coal.

Adversary brief relies upon authorities which I submit with greatest respect, does not sustain adversary contention.

Lemke vs. Farmers Grain Co., 258 U. S. 50 (erroneously cited as 259 U. S.) rules that contracts for the purchase of grain in North Dakota to be shipped to other states is a necessary part of interstate commerce.

Dahnke-Walker Mill Co. vs. Bondurant, 257 U. S. 282, holds that a purchase of wheat in Kentucky to be shipped in Tennessee is interstate commerce.

These cases are authority for the proposition that the Federal Coal Company was engaged in interstate commerce in buying the coal in question, but as pointed out above, it does not follow from that, that petitioner Flanagan was engaged in interstate commerce in making the sale.

Spaulding & Bros. vs. Edwards, 262 U. S. 66, 67 L. Ed. 865, rules that a direct tax levied by Congress upon baseball bats was not applicable to a shipment of such goods delivered on board ship for export to Venezuela. The tax upon the sale was in effect a tax or duty on the export and prohibited by Section 9, Article 1 of the Constitution. The question there considered was not analogous to the question in the instant case. There, the tax was levied directly upon the sale. It was in effect a tax upon the article sold because the tax must necessarily be added to the price.

In the instant case, the Tennessee Statute under consideration does not levy a tax upon the sale nor upon the article sold, but alone upon the privilege of engaging in a local business to which the sale to the Federal Coal Company was only incidental.

Railroad Commission vs. Texas & Pacific Railroad Co. 299 U. S. 336, is also relied upon in adversary brief. That case held void as a regulation of interstate commerce an order of the Railroad Commission of the State of Louisiana fixing interstate rates as applied to a shipment of

logs and staves from points in Louisiana to New Orleans for export to foreign countries.

The case of *Texas & New Orleans vs. Sabine Tram Co.*, 227 U. S. 111, relied on in adversary brief also ruled that a shipment of lumber from one point in Texas to another as part of an interstate trip was interstate commerce.

Each of those cases but apply the familiar rule that an article is in interstate commerce when it is started on an interstate trip; and, the fact is not changed by the form of bill of lading or the necessities for reloading or transfer to another carrier which the exigency of the intestate trip may require. Neither of these cases have any application here.

Board of Trade vs. Olsen, 262 U. S. 1, 67 L. Ed. 839, is also relied upon in adversary brief. That case holds that the stopping of an interstate shipment at Chicago for temporary purposes, and then continuing the shipment under the same contract of carriage does not take the grain out of interstate commerce. That case sustained the validity of the Grain Futures Act of Congress regulating interstate commerce in grain. Unquestionably, Congress had power to regulate interstate commerce in grain, and the determinative question was whether or not the temporary stopping of the grain in Chicago took it out of the interstate commerce. Having reached the conclusion that the stoppage in Chicago was temporary, and but an incident in the interstate trip, the power of Congress to regulate the dealing in the grain while on the trip or while temporarily stopped was unquestioned.

Stafford vs. Wallace, 258 U. S. 495, 66 L. Ed. 735, is also cited in adversary brief. The Act of Congress assailed in that case provided for the regulation of stockyards and the business of packers done in interstate commerce, and empowered the Secretary of Agriculture to make certain investigations and rulings with respect thereto. The Secretary had promulgated a ruling respecting the stock yards at Chicago, and the question was whether or not these stock yards and the business of the packers affected by the order who were complainants in that cause were so directly connected with interestate commerce as to be a part of it within the power of Congress to regulate. The Court held from the facts that the stock yards in question were a necessary part of the commerce in stock; that it was the purpose of the Constitution to give to the Federal Congress full powers to regulate this commerce and that purpose would not be defeated by a technical inquiry into the non-interstate character of some of its necessary incidents and facilities when considered alone and without reference to their association and influence upon the stream of commerce flowing between the state. This case followed and approved a similar holding in *Swift & Co. vs. U. S.*, 196 U. S. 375, also cited in adversary brief.

These several cases are instructive as illustrations of what constitutes interstate commerce in modern business. The principles which control the decisions are time honored and sustained by a long line of holdings, but as pointed out in those cases, there is a wide difference between a sale by a single dealer in grain or a single dealer in live stock, and the organization of a grain exchange in Chicago controlling the movement in commerce of a large

part of the grain grown in this country or the organization of the stock yards in Chicago controlling the movement in commerce of a large part of the cattle and live stock in this country.

A single sale of two hundred cars of coal by petitioner Flanagan to the Federal Coal Company will have no effect upon interstate commerce, but if Flanagan had combined with all the other dealers of coal in the United States, and formulated with them rules and regulations to create a coal exchange to handle a large part of the coal produced in the country, then the combination so formed would operate directly on interstate commerce, and the power of Congress to regulate it would apply. Clearly, the ruling in the stock yards case, the grain futures case and the Swift & Company case has no bearing upon the question here under consideration.

The other cases relied upon in adversary brief of *Eureka Pipe Foundry Co. vs. Walter S. Hallanan,* 257 U. S. 265; *Fuel Gas Co. vs. Walter S. Hallanan,* 257 U. S. 277, and *Pennsylvania vs. West Virginia,* 262 U. S. 553, are likewise distinguishable from the case at bar upon similar grounds.

Adversary brief cites *Heyman vs. Hays,* 236 U. S. 176, as authority for its position. This is a privilege tax case arising under a similar statute of Tennessee. The syllabus is,

> "The interstate character of the business prevents the State from imposing a privilege tax upon the business of soliciting by mail orders for intoxicating liquors from persons in other states, and the delivery for interstate shipment to a car-

> rier within the state in fulfillment of such orders of intoxicating liquors from an existing stock on hand in the state."

In that case the only business done was the receipt of mail orders from other states and the acceptance of the same by the delivery of the liquor to the carriers consigned to purchasers in other states. The orders when received did not become contracts until accepted by the delivery of liquor to the carriers. It was this delivery to the carrier that consummated the sale and created the business sought to be taxed. The execution of the contact necessarily involved transportation of the liquor in interstate commerce. The carrier was but the means of effecting delivery of the goods. It was insisted for the State that the carrier was the agent of the purchaser, and for that reason the sale became complete upon delivery to the carrier, and, consequently, the transaction was local. That insistence was rejected, the Court saying:

> "But this is immaterial since it is not open to controversy that substance and not form controls in determining whether a particular transaction is one of interstate commerce, and hence that the mere method of delivery is a negligible circumstance if in substance and effect the transaction under the facts of a given case is interstate commerce."

In the instant case, the contract recites that it is between John D. Flanagan "Of Tracy City, Tennessee," and the Federal Coal Company "of Chattanooga, Tennessee." It provides for delivery to the purchaser "f. o. b. cars" in Tennessee.

The principle that the contract must necessarily involve in its execution transportation across state lines in order to be a part of interstate commerce was aptly stated by Chief Justice Taft in *U. S. vs. Addyston Pipe & Steel Co.*, 85 Federal, 298, in this language:

> "The goods are not within the control of Congress until they are in actual transit from one state to another. But the negotiations and making of sales, which necessarily involve in their execution the delivery of merchandise across state lines, are interstate commerce and so within the regulating power of Congress even before the transit of the goods in performance of the contract has begun."

In *Ware vs. Mobile County*, 209 U. S. 406, 52 Law Ed. 859, this Court considered the power of a state to impose a license tax upon a cotton broker. After citing cases holding that a tax could not be imposed upon interstate dealing in goods, the Court said:

> "In these cases goods in a foreign state are sold upon orders for the purpose of bringing them to the state which undertakes to tax them, and the transactions are held to be interstate commerce because the subject matter of the dealing is goods to be shipped in interstate commerce to be carried between states and delivered from vendor to vendee by means of interstate carriage."

Distinguishing those cases from the one under consideration, the Court said:

> "He did not contract to ship it from one state to the place of delivery in another state, and though it is stipulated that shipments were made from Alabama to the foreign state in some in-

stances that was not because of any contractural obligations so to do. In neither class of contracts for sale or purchase was there necessarily any movement of commodities in interstate traffic because of the contracts made by the brokers. * * * The delivery when one was made was not because of any contract obliging an interstate shipment, and *the fact that the purchaser might thereafter transmit the subject matter of purchase by means of interstate carriage did not make the contracts as made and executed the subjects of interstate Commerce.*" (Italics ours.)

The text writer of *Corpus Juris*, Vol. 12, page 21, states the rule thus:

> "The power of Congress to regulate interstate or foreign commerce includes the power to legislate on the subject of private contracts which directly and substantially relate to such commerce, as for instance, contracts which directly involve transportation from one state to another. On the other hand, contracts which in no way involve transportation are not in and of themselves any part of interstate commerce; neither is a contract of an interstate character where interstate commerce may become only incidental to its execution, and is not a part of it as between the parties to the contract.

Applying this rule to the question of sales of merchandise, the same text writer, page 26, uses this language:

> "Delivery to the purchaser of goods in another state is an inherent and essential part of the intercourse defined by the word 'commerce,' and it is a general rule that a sale is a transaction of interstate commerce subject to Federal regulation but free from state laws consisting of taxation,

> foreign corporation or other regulatory measures, where transportation of the subject matter of the sale from one state to another is essential to delivery to the purchaser, and the consequent completion or performance of the contract of sale.
>
> * * * * * *
>
> "A completed contract of sale between residents of a state is not a transaction of interstate commerce, nor is a contract between citizens of different states, when the contract is made and delivery accepted in the state where the property is situated, although the buyer intends to ship the property outside the state."

Reference is made in adversary brief to the fact that the contract with the Federal Coal Company was made on August 19th, 1920, and that petitioner Flanagan had paid the tax and obtained a license to do business which did not expire until September 18th, 1920. However, adversary brief admits that the contract was performed by both parties until after September 18th, and that the right of action on the contract did not arise in favor of Flanagan until December when he was doing business without paying a tax or procuring the license required.

No reasons are given, or authorities cited, why the facts of his previous compliance with the law would save the right of action now sued on from the taint of illegality.

Adversary brief (p. 6) quotes the Tennessee statute making it a misdemeanor to exercise the privilege of a coal dealer without first paying the tax and procuring a license. Tennessee Supreme Court in this case has construed that statute to create a public policy in Ten-

nessee baring the right of action in favor of Flanagan which arose as an incident of his illegal business.

In *Stevenson vs. Ewing*, 87th Tennessee, 48, the Supreme Court of that state on this question had ruled,

> "When the tax takes the form of a tax on privileges of following an employment, * * * * * the persons taxed will be compelled to pay the tax as a condition to the right to carry on the business at all. In such case the business carried on without a license will be illegal, and no recovery can be had upon contracts made in the course of it."

In *Hart vs. Brewing Co.*, 122 Tennessee, 69, that Court ruled,

> "The rule is the same when the purpose of the contract although lawful when made becomes unlawful by statutes enacted before the full performance of its term * * * *, therefore, if one agrees to do a thing which it is lawful for him to do, and it becomes unlawful by an Act of Legislature, the Act avoids the promise."

A number of Tennessee cases in construing the same and similar statutes have ruled that as a matter of public policy the courts of Tennessee will deny relief to any person for the enforcement of a right of action arising out of an unlawful business. *Carey, Lombard Lumber Co. vs. Thomas*, 97 Tenn., 597; *Insurance Co. vs. Kennedy*, 96 Tenn., 712; *Singer Mfg. Co. vs. Draper*, 102 Tenn., 262; *Westerson vs. Nashville*, 106 Tenn., 410.

It is for the Court of last resort in Tennessee to construe its statutes and define its public policy. So long

as the public policy so defined does not violate the Federal Constitution, it will be recognized and followed in the Federal courts. In this Court, the question is not open for review.

On the whole case, I insist there is no error shown in the judgment of the State Court.

Respectfully submitted,

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